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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

YADAO FAMILY TRUST et al.,

Cross-defendants and
Appellants,

v.

JAMKE,

Cross-complainant and
Respondent.

F045446

(Super. Ct. No. 343646)

O P I N I O N

APPEAL from an order of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Andrew W. Shalaby for Cross-defendants and Appellants.

Lawrence C. Beaver for Cross-complainant and Respondent.

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Appellants, Benny Yadao, Procsy Yadao, and the Benny and Procsy Yadao Family Trust, filed a complaint for quiet title against respondent, JAMKE, a California general partnership. Respondent had acquired title to the parcel at issue through foreclosure on its first deed of trust. Although appellants had owned the parcel at one

time, the holder of the second deed of trust had acquired title through foreclosure before respondent instituted its own foreclosure proceedings.

Thereafter, respondent filed a cross-complaint for slander of title. Appellants then moved to strike the cross-complaint as a SLAPP (Strategic Litigation Against Public Participation) suit under Code of Civil Procedure¹ section 425.16. The trial court denied appellants' motion. On appeal from the denial of their motion, appellants contend that the anti-SLAPP statute protects their quiet title action and therefore the burden shifted to respondent to establish a probability that it will prevail on the cross-complaint.

Appellants are correct. A cause of action that arises from the act of filing a complaint potentially qualifies as a SLAPP suit. Since the trial court denied appellants' motion before it had the opportunity to consider whether there is a probability that respondent will prevail on its cross-complaint, the matter must be remanded to the trial court to determine this issue.

BACKGROUND

In April 2002, appellants purchased real property consisting of three parcels from Gary Fant. Fant carried back a note for approximately \$928,000 secured by a second deed of trust on all three parcels. The parcel at issue in this appeal, 416 Corson Avenue, Modesto, was sold subject to a first deed of trust securing a note for \$243,000 in favor of H.F. Data. H.F. Data later transferred this note to respondent.

On July 11, 2003, a trustee's sale was held on Fant's junior deed of trust. Fant made a credit bid and obtained title to the three parcels. Appellants contend this foreclosure was wrongful and are involved in a pending legal dispute with Fant.

On November 12, 2003, a trustee's sale was held and respondent acquired title to 416 Corson Avenue, the parcel secured by its deed of trust. Thereafter, appellants filed a

¹ All further statutory references are to the Code of Civil Procedure.

quiet title action against respondent and recorded a lis pendens on the property. According to appellants, Fant did not have good title to this property when respondent foreclosed and respondent had notice of the concomitant legal actions appellants were taking.

On March 4, 2004, respondent filed a cross-complaint for slander of title seeking damages from appellants and the cancellation of the lis pendens. Appellants then moved to strike this cross-complaint on the ground that it was a SLAPP suit. Respondent defended this motion based solely on its position that section 425.16 did not apply to appellants' complaint and consequently the burden had not shifted to respondent to establish that it would prevail on its cross-complaint. According to respondent, "None of the causes of action in the complaint constitute a prima facie showing of matters which fall within the realm of public significance as was contemplated in the Legislative intent of CCP 425.16."

The trial court denied appellants' motion and this appeal followed. (§ 904.1, subd. (a)(13).)

DISCUSSION

Section 425.16 was enacted in 1992 to provide a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) It is California's response to meritless lawsuits brought to harass those who have exercised these rights. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644, overruled on a different ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) In 1997, the Legislature added a provision mandating that courts "broadly" construe this section to further the legislative goals of encouraging participation in

matters of public significance and discouraging abuse of the judicial process. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 473.)

This type of suit, referred to under the acronym SLAPP, or strategic lawsuit against public participation, is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 927.) SLAPP plaintiffs do not intend to win their suits. Rather, these suits are filed solely to delay, distract, and punish citizens who have exercised their political rights. (*Ibid.*) Nevertheless, the plaintiff's primary purpose in bringing the suit is irrelevant. The anti-SLAPP statute does not require the court to explore the plaintiff's subjective motivations before determining whether the anti-SLAPP statute is applicable. (*Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 480.)

The SLAPP strategy also works if the matter is already in litigation. The defendant/cross-complainant hopes to drive up the cost of litigation to the point where the plaintiff/cross-defendant will abandon the case or have fewer resources available to prosecute the action against the defendant/cross-complainant. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816, overruled on another ground in *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 68, fn. 5.)

When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. (*Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 473.) To determine whether this motion should be granted, the court must engage in a two-step process.

First, the court decides whether the defendant has made an initial prima facie showing that plaintiff's suit arises from an act in furtherance of the defendant's right of petition or free speech in connection with a public issue. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043.) A defendant can meet this burden by demonstrating that the act underlying the plaintiff's cause arises from any statement or

writing made in, or in connection with an issue under consideration or review by, a legislative, executive, judicial or other official proceeding or body. (§ 425.16, subd. (e); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.) As pertinent here, the constitutional right to petition includes the basic act of filing litigation or otherwise seeking administrative action. (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115.) There is no need to separately demonstrate the existence of a “public issue.” (*Sipple v. Foundation For Nat. Progress, supra*, 71 Cal.App.4th at p. 237.)

If the court finds the defendant has made the requisite showing, the burden shifts to the plaintiff to establish a probability that it will prevail on the claim. (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 646.) In order to meet this burden, the plaintiff must make a prima facie showing of facts based on competent admissible evidence that would, if proved, support a judgment in the plaintiff’s favor. (*Ibid.*) The trial court may also consider the defendant’s opposing evidence but only to determine if it defeats the plaintiff’s showing as a matter of law. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.) In other words, the court does not weigh the evidence or make credibility determinations. (*Wilcox v. Superior Court, supra*, 27 Cal.App.4th at pp. 827-828.)

The questions of whether the action is a SLAPP suit and whether the plaintiff has shown a probability of prevailing are reviewed independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

Here, contrary to the position taken by respondent, appellants met their initial burden. Respondent’s cross-complaint alleges that its title to the real property at issue was slandered when appellants filed their quiet title complaint and recorded the lis pendens. Accordingly, respondent’s cross-complaint arises from an act in furtherance of appellants’ right of petition, i.e., their act of filing the complaint against respondent. Although respondent’s slander of title cause of action focuses on the existence of the lis

pendens, it still meets the first prong of the anti-SLAPP statute. Appellants were required to record a lis pendens upon the filing of their quiet title complaint. (§ 761.010.)

As noted above, respondent defended appellants' motion solely on the ground that its cross-complaint did not arise from an act protected by section 425.16. Respondent takes the same position on appeal. Thus, respondent has never attempted to satisfy the burden imposed by the second prong of the anti-SLAPP statute, i.e., whether there is a probability that respondent will prevail on its cross-complaint. Since the trial court ruled in respondent's favor, it is clear that the court did not consider this second prong. Consequently, this case must be remanded to the trial court for a determination of whether there is a probability that respondent will prevail on its cross-complaint. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

DISPOSITION

The order denying appellants' motion to strike the cross-complaint under section 425.16 is reversed. The matter is remanded to the trial court for further proceedings to determine whether respondent can establish there is a probability that it will prevail on the cross-complaint. Costs on appeal are awarded to appellants.

Levy, Acting P.J.

WE CONCUR:

Cornell, J.

Dawson, J.